

Summary of U.S.-Chile FTA Services Chapter:

The Chile FTA Cross-Border Services Chapter was developed with reference to the NAFTA, the GATS and other trade priorities that have emerged since the time that those agreements were negotiated.

Scope, Coverage and Definitions: The scope of the FTA Services Chapter applies to measures by a Party affecting cross-border trade in services. The Chapter includes an illustrative but non-exhaustive list of such measures.

One of the most basic definitions of the Chapter is that of cross-border trade or cross-border supply of services, which is defined as: from the territory of one party into the territory of another party (example: electronic delivery of services from the U.S. to Chile -- or vice versa); in the territory of a Party by one person of that Party to a person of the other Party (example: Chile commits to allow its nationals to travel to the U.S. to buy services -- or vice versa); and by a national of a party in the territory of another Party (for example, when a national from the U.S. enters Chilean economic space on a temporary basis to supply services **B** or vice versa).

The definition of cross-border supply of services does not include investment to supply services; such investment is governed by the rules in a separate FTA Chapter on Investment. However, the cross-border service chapter does extend its provisions on transparency, domestic regulation and ~~A~~market access[@](detail on these provisions below) to investment to supply services which otherwise would not benefit from such obligations.

The scope provision contains additional definitions of: enterprise; enterprise of a Party; professional services; service supplier of a Party; and specialty air services. Other definitions found in the General Definitions for the FTA as a whole also are pertinent to the services chapter.

The scope provision affirms that the chapter pertains to central, regional and local governments and authorities and any non-governmental bodies in the exercise of powers delegated by such governments.

The FTA Services Chapter excludes financial services and government procurement of services. It also excludes services supplied in the exercise of governmental authority. To qualify as a service supplied in the exercise of governmental authority, the service may not be supplied on a commercial basis or under conditions of competition. Air transportation is not covered although the chapter does apply to specialty air services and to aircraft repair and maintenance services.

The FTA Services Chapter does not include subsidies under its scope provision. However, it was clear during negotiations that the treatment of subsidies must be explored on a country and sector-specific basis, and the Parties eventually agreed on the importance of an additional commitment relating to express delivery services.

National treatment: The FTA Services Chapter contains provisions on national treatment that require each government to accord service suppliers of the other Party treatment no less favorable than that government accords, in like circumstances, to its own service suppliers. Reflecting the particular context and developments in the Chile negotiations, the national treatment provision also affirms that a Party shall accord treatment by a regional level that is no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level to service suppliers of which it forms a part.

Most-favored-nation treatment: The FTA Services Chapter contains provisions on national treatment that require each government to accord service suppliers of the other Party treatment no less favorable than that government accords, in like circumstances, to the service supplier of a non-Party.

Both the national treatment and most-favored-nation treatment articles contain a footnote that affirms that the use of *service suppliers* is understood to have the same meaning as the use of *services* and *service suppliers* as found in the equivalent GATS provisions.

Market access: The FTA Services Chapter contains a core provision on *market access*, drawn from GATS, that pertains to non-discriminatory quantitative restrictions (for example, limitations on the number of service suppliers through numerical quotas, monopolies, exclusive service suppliers or economic needs tests) and any measures which restrict or require specific types of legal entity through which a service supplier may supply a service (for example: if a Party prohibited subsidiaries as a form of supplying a service). Unlike the NAFTA, this article is a core provision that must be matched up with countries=regimes and appropriate non-conforming measures taken (it is not just a transparency obligation).

No local presence: The FTA Services Chapter prohibits governments from requiring a Party to incorporate or make any form of local investment to supply on a cross-border basis. It also prohibits residency requirements as a condition for supplying a service.

Non-conforming measures: The article on non-conforming measures provides the mechanism whereby each Party is responsible for reviewing its cross-border services regime for conformity with the core obligations on national treatment, most-favored-nation treatment, *market access*, and no local presence. Under the structure of the Article, non-conforming measures at the central and regional level must be set out in accompanying annexes. Annex I pertains to existing non-conforming measures and Annex II pertains to existing or future non-conforming measures or sectors. Non-conforming local level measures existing at the time of entry into force of the FTA are *grandfathered* (exempt from dispute settlement challenge) through language in the Article itself.

The Annex entries are subject to negotiation to obtain an outcome that is supportive of free trade

while recognizing country-specific sensitivities. For example, the U.S. includes an Annex I Grandfather for regional level (state level) non-conforming measures existing at the time of entry into force of the FTA.

Annex I also contains an important provision that binds any subsequent liberalization of a non-conforming measure for the purposes of the FTA.

Transparency of domestic regulatory frameworks: The article on transparency of domestic regulatory frameworks, including regulations that pertain to licensing authorization or criteria, provides obligations that are in addition to those found in the FTA-wide Chapter on Transparency. The article requires each Party to maintain or establish appropriate mechanisms to respond to enquiries from interested persons on regulations and their requirements. The FTA-wide Chapter on Transparency provides procedures for advance notice and comment on draft regulations. The Services article complements this by requiring that at the time it adopts final regulations, each Party shall, to the extent possible, address in writing substantive comments received from interested persons on the draft regulations. Another objective for the U.S. in FTAs is that when the advance notice and comment procedures cannot be met, to the extent possible, each Party provides the reasons therefore. The article also spells out that to the extent possible, a Party shall allow a reasonable time between publication of final regulations and their effective date.

Domestic Regulation: This article builds on the GATS (Article VI) and NAFTA (Article on Licensing and Certification) approaches. The provision on domestic regulation does not repeat the GATS article VI requirement that measures of general application should be applied on a reasonable, objective and impartial basis **B** but only because these principles already are captured in the FTA-wide Chapter on Transparency. For the same reason, the article does not include requirements to ensure access to judicial, arbitral or administrative tribunals or procedures.

The article includes requirements relating to the interaction between the competent authorities of a Party and those suppliers seeking authorization to supply a service. The competent authorities must inform the applicant of the decision concerning the application within a reasonable period of time and, at the request of the applicant, provide information concerning the status of the application.

In addition, regarding qualification requirements and procedures, technical standards and licensing requirements, each Party shall endeavor to ensure, as appropriate for individual sectors, that any such measure is based on objective and transparent criteria, is not more burdensome than necessary to ensure the quality of the service; and in the case of licensing procedures, does not constitute a restriction on the supply of a service.

Finally, a mechanism ensures that if the results of any negotiations related to GATS VI:4 or any similar negotiations in other multilateral fora enter into effect, the outcome will be brought into

the Services Chapter after appropriate consultations between the Parties.

Mutual recognition: Each Party is enabled to negotiate recognition of the standards or criteria for authorization, licensing or certification of service suppliers but cannot provide such recognition in a manner which would constitute discrimination between countries or a disguised restriction on trade. It is made clear that if one Party accords such recognition to a non-Party, such recognition does not have to be provided to its FTA partner.

Implementation: The Parties will meet annually or as otherwise agreed on implementation of the Chapter's obligations and any issues of mutual interest, with a few such issues specified in advance.

Denial of Benefits: The provision is subject to the Consultation article that applies to the FTA as a whole. The provision permits each Party to deny benefits of the Chapter to service suppliers of the other Party where the service is being supplied by an enterprise that is owned or controlled by persons of a non-Party but only if that non-Party does not have substantial business activities in place (cannot be a shell investment).

The provision also preserves the foreign policy prerogative of each Party to deny benefits to enterprises owned or controlled by nationals of a non-Party with which it does not have diplomatic relations or to which it is applying economic sanctions.

Annex on Professional Services: This Annex highlights that the Parties shall encourage the relevant bodies in their respective territories to develop mutually acceptable criteria for licensing and certification of professional service suppliers. It provides a list of the types of issues that could be considered for such recognition. In addition, it contains a few elaborations of a sectoral nature relating to engineering and foreign legal consultancy.